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No. 89-1290

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ROBERT R. FREEMAN, *et al.*,
Petitioners,

v.

WILLIE EUGENE PITTS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONERS

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As the Court can determine by examining the opinions of the Eleventh Circuit and the district court, respondents' arguments in opposition to the petition focus on a factual setting that bears no resemblance to the facts of this case. Indeed, respondents' cavalier restatement of the facts and the legal holdings of the decisions below render those decisions virtually unrecognizable. On the crucial issue of whether the petition should be granted, respondents do not deny the existence of an acknowledged conflict among the circuits on the first question presented nor the importance of both questions. To the contrary, their revisionist approach to the facts is an implicit concession that if the legal issues are properly presented—and they are—then review by this Court is warranted.[1]

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[1] Petitioners' reading of the decisions below is supported by the decision of the National School Boards Association (NSBA) to file

1. The first issue presented is whether petitioners properly were barred from obtaining a finding of unitariness with respect to student assignment solely because other aspects of the school district's operations, in particular, faculty and staff assignment, had not simultaneously achieved unitary status for a period of three years. See Pet. i. Respondents, for their part, do not dispute that the question presented is an important one or that there is a conflict on that issue. Rather, respondents' *only* argument in opposition to the petition is that the question "is simply not presented by this record" (Opp. 16) because "the [district] court found that DCSS still had not achieved 'maximum practical desegregation' with respect to student assignment at the time of trial." Opp. 7, citing Pet. App. 47a.

Turning to the page of the district court's opinion cited by respondents, it becomes clear that the district court in fact reached precisely the opposite conclusion:

> this court finds that the DCSS has achieved maximum practical desegregation as of the 1986-1987 school year. . . . The DCSS has become a system in which the characteristics of the 1954 dual system have been eradicated, or if they do exist, are not the result of past or present intentional segregative conduct by defendants or their predecessors.

Pet. App. 47a; see also *id.* at 44a ("the court . . . finds that defendants' actions achieved maximum practical desegregation from 1969 to 1986"). Based on these findings, the district court concluded that "the DCSS is a unitary system with regard to the area[] of student assignment" (*id.* at 71a) and accordingly, held that it

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a brief *amicus curiae* in support of the petition. The Association, which will not take a position on the merits of these issues (NSBA *Amicus* Brief, 9), has determined, based on its neutral assessment of the legal issues, that the decision below presents two questions of exceptional importance concerning the proper standards for determining when a school system has achieved unitary status.

would "order no further relief" with respect to student assignment. *Id.* at 72a.

Respondents did not challenge the district court's factual findings, and the court of appeals did *not* overturn those findings as clearly erroneous. See Pet. App. 11a, 18a-19a. Instead, the court of appeals, *as a threshold matter*, "reject[ed] the First Circuit's ruling which permits school systems to achieve unitary status incrementally." *Id.* at 15a-16a. Thus, while the Eleventh Circuit acknowledged and affirmed the district court's factual finding that "no evidence [exists] that the school system's previous unconstitutional conduct may have contributed to [current] segregation" in student assignment (Pet. App. 18a), that factual finding was not relevant under the legal standard articulated by the court. *Id.* at 13a-14a.[2]

In the Eleventh Circuit's view, the "district court erred" (Pet. App. 13a) in holding that the DCSS had achieved "unitary status" in student assignment—not because that conclusion was factually incorrect—but because, as a matter of law, unitary status can be achieved only "[i]f the school system fulfills all six [*Green*] factors *at the same time* for several years . . . ." *Id.* at 14a.

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[2] Respondents' arguments are based largely on earlier factual statements of the district court, which respondents assert are binding as "law of the case." Opp. 3 n.3, 15 n.14, 16. However, the law of the case doctrine in the Eleventh Circuit permits district judges to reexamine and revise prior factual findings in an ongoing case:

> To hold that a district court must rigidly adhere to its own rulings in an earlier stage of a case would actually thwart the purpose of the doctrine. New developments or further research often will convince a district court that it erred in an earlier ruling, or the court may simply change its mind.

Robinson v. *Parrish*, 720 F.2d 1548, 1550 (11th Cir. 1983). To the extent that earlier rulings of the district court contain contrary statements, the only factual findings relevant to this petition are those contained in the decisions in the appendix to the petition. Respondents' suggestion that the earlier statements are binding is both misleading and flatly incorrect.

Because the petitioners had not achieved unitary status with respect to all *Green* factors, the Eleventh Circuit held that petitioners had an ongoing obligation to "gain and maintain a desegregated student population." *Id.* at 19a.

In sum, the Eleventh Circuit acknowledged that its decision regarding "incremental" approaches to unitariness is in square conflict with the First Circuit's decision in *Morgan* v. *Nucci*, 831 F.2d 313 (1st Cir. 1987). Putting aside their desire to rewrite the facts, respondents, for their part, dispute petitioners' claim that the holding in *Morgan* and the analysis in this Court's decision *Pasadena City Bd. of Ed.* v. *Spangler*, 427 U.S. 424 (1976), cannot be reconciled with the Eleventh Circuit's threshold analysis. See Opp. 12 n.9. That, by itself, is sufficient to warrant review by this Court of this case.[3]

2. The second question presented is whether a formerly *de jure* school system which had achieved effective desegregation in student assignments is nevertheless obligated to remedy the effects of demographic changes on student assignment, where the demographic shifts were completely beyond the school district's control. Again, rather than address whether this question is worthy of review, respondents attack the district court's factual

[3] The Court currently has pending before it a petition in *Board of Education* v. *Dowell*, No. 89-1080 (filed Jan. 3, 1990), which raises related issues concerning the proper approach to determine whether a school system is unitary and, if so, what the effect of that determination is. The incremental unitariness issue presented in this case is logically precedent to the issues in *Dowell* because the latter issues can only be addressed once the Court resolves the threshold question of incrementalism presented in this case. Thus, if the Court grants the petition in *Dowell*, it should grant this petition as well so that the various components of the unitariness inquiry could be resolved simultaneously. Even if the Court were to deny the petition in *Dowell*, however, the issue presented here requires resolution now for the reasons stated in the Petition and by the National School Boards Association in its brief as *amicus curiae* in support of the petition.

findings, asserting that "there is strong reason to doubt" that the current distribution of students "was caused solely by residential factors." Opp. 19.

At the outset, respondents' current skepticism regarding the "cause" of segregation was not embraced by respondents or by the district court at the time of trial. Indeed, the district court noted that "[respondents] concede that the racial segregation in DeKalb County is the result of demographic shifts." Pet. App. 34a. In addition, the district court also made a clear factual finding that the demographic changes had the effect of increasing segregation in student assignment and that "[t]he rapid population shifts in DeKalb County were not caused by any action on the part of the DCSS." *Id.* at 44a.

The district court's conclusion that current imbalances in student assignment were caused by demographic changes and not by any conduct of petitioners could not be clearer:

> Based upon the dramatic effect the implementation of the June, 1969 order had on eradicating the vestiges of the prior dual system, the DCSS' continuing efforts to battle resegregation . . ., the absence of any persuasive evidence indicating that the actions of the DCSS in any way promoted the resegregation that occurred in the County, and the evidence that indicates that other efforts by the DCSS would not have effectively stopped or even slowed the rapid demographic changes that brought residential segregation to the County, this court finds that the DCSS has achieved maximum practical desegregation . . . .

Pet. App. 46a-47a. Respondents did not attack these factual findings in the court of appeals and their eleventh hour attempt to disavow them provides no basis to deny the petition.[4]

[4] Respondents' attempts to revise the factual record are based on nothing more than speculation: respondents argue that "it is impos-

Moreover, the Eleventh Circuit's holding with regard to the causation issue did not refute, in any way, the district court's factual findings. To the contrary, the court of appeals accepted the conclusion that increasing segregation in student assignment resulted from shifting demographic patterns beyond the control of petitioners. However, the Eleventh Circuit squarely "reject[ed] the district court's refusal to require the DCSS to eradicate segregation caused by demographic changes." Pet. App. 20a. According to the Eleventh Circuit, "a school system that has not achieved unitary status"—as measured by all six *Green* factors at the same time for several years—"must take affirmative steps to gain and maintain a desegregated student population." *Id.* at 19a. The "fact that the DCSS achieved racial parity in the area of student assignment" (*id.* at 20a) was irrelevant to the court of appeals' analysis; until unitary status was reached in all respects, the school board was required to take "affirmative steps" to remedy all imbalances in student assignment, even those caused by shifting demographic patterns. *Id.* at 19a.

Respondents make no effort to explain how the decision below can be squared with this Court's holding in *Spangler* that:

> Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.

Pasadena City Bd. of Ed. v. *Spangler*, 427 U.S. 424, 436 (1976) (*quoting Swann* v. *Board of Education*, 402 U.S. 1, 31-32 (1971)). In seeking to improve the racial balance in the schools, the decision below simply reads the "causation" requirement out of the remedial stage of desegregation litigation. In doing so, it significantly expands federal authority over *de facto* segregation and undermines the role of state and local officials. Given the large number of school districts that remain under federal court supervision, especially in the Eleventh Circuit, the question presented in this case—which involve the most basic principles of "unitariness" litigation—clearly warrant review at this time by this Court.

CONCLUSION

For the foregoing reasons and those stated in the peition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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sible to know what would have happened to this [residential housing] pattern if busing had been implemented in 1969 or at any point thereafter." Opp. 20. Such speculation regarding the effects of remedial programs which were not chosen—and which were not sought by respondents—was specifically rejected by the district court. Pet. App. 44a. Instead, the district court simply concluded that because the Constitution does not mandate racial balance (Pet. App. 46a), the petitioners could not be held liable for segregation in school assignments that was caused by demographic shifts and not by "the past or present intentional segregative conduct" of petitioners. *Id.* at 47a.